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In the Supreme Court of the United States

JAMES LARUE, PETITIONER

v.

DEWOLFF, BOBERG & ASSOCIATES, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

PAUL D. CLEMENT
Solicitor General
Counsel of Record
EDWIN S. KNEEDLER
Deputy Solicitor General
MATTHEW D. ROBERTS
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

JONATHAN L. SNARE
Acting Solicitor of Labor
TIMOTHY D. HAUSER
Associate Solicitor
ELIZABETH HOPKINS
Counsel for Appellate and Special Litigation
Department of Labor
Washington, D.C. 20210

QUESTIONS PRESENTED

1. Whether Section 502(a)(2) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(a)(2), authorizes a participant in a defined contribution pension plan to sue to recover losses to the plan caused by a fiduciary breach when the losses are attributable to the participant's individual plan account.

2. Whether an action by a plan participant against a fiduciary to recover losses caused by a fiduciary breach seeks "equitable relief" within the meaning of ERISA Section 502(a)(3), 29 U.S.C. 1132(a)(3).

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INTEREST OF THE UNITED STATES

This case concerns the scope of two civil enforcement provisions in Title I of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* The Secretary of Labor has primary authority for enforcing and administering Title I of ERISA. In response to an invitation from the Court, the United States filed an amicus brief in this case at the petition stage.

STATEMENT

1. Petitioner is a participant in an ERISA-covered Section 401(k) pension plan sponsored by his employer, respondent DeWolff, Boberg & Associates, Inc. (DeWolff). Pet. App. 2a; see 26 U.S.C. 401(k) (2000 & Supp. IV 2004). DeWolff administers the plan and is thus an ERISA fiduciary. Pet. App. 2a; 29 U.S.C. 1002(21)(A)(iii). The plan is a "defined contribution" or "individual account plan." That type of plan "provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such partic-

ipant's account." 29 U.S.C. 1002(34). Although each participant has an individual account, all of the assets are held in trust by plan trustees, who retain title to and authority over the assets. 29 U.S.C. 1103(a); Rev. Rul. 89-52, 1989-1 C.B. 110.

Under the plan, participants may choose among several investment options and direct DeWolff, as plan administrator, to invest the amounts allocated to their accounts in specified percentages among those options. Pet. App. 2a. Petitioner claimed that DeWolff breached its fiduciary duties by failing to follow petitioner's directions, causing a loss of approximately $150,000 to his "interest in the plan." *Id.* at 2a-3a. Petitioner sought to have the plan reimbursed for that loss, as "appropriate 'make whole' or other equitable relief pursuant to [ERISA Section 502(a)(3), 29 U.S.C. 1132(a)(3)]." Br. in Opp. App. 4a; *id.* at 50a. Section 502(a)(3) authorizes a plan participant and others to sue for, among other things, "appropriate equitable relief * * * to redress" "any act or practice which violates" ERISA. 29 U.S.C. 1132(a)(3). The district court entered judgment on the pleadings for respondents, concluding that the monetary remedy sought by petitioner is unavailable under ERISA. Pet. App. 15a-21a.

2. The court of appeals affirmed. Pet. App. 1a-14a. The court first rejected petitioner's argument that respondents are liable for the $150,000 loss to the plan under ERISA Sections 502(a)(2) and 409(a), 29 U.S.C. 1109(a), 1132(a)(2). Those provisions authorize a participant, beneficiary, fiduciary, or the Secretary of Labor to sue a fiduciary to recover "losses to the plan" resulting from a breach of fiduciary duty. 29 U.S.C. 1109(a); see 29 U.S.C. 1132(a)(2). The court held that, "[e]ven if the [Section 502(a)(2)] argument were not * * * waived," petitioner could not state a claim under that provision because "[r]ecovery under [Section 502(a)(2)] must 'inure[] to the benefit of the plan *as a whole*,' not to particular persons with rights under the plan." Pet. App. 5a (quoting *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 140 (1985)). The court concluded that petitioner's suit would not benefit the plan as a whole for three rea-

sons: (1) he sought "recovery to be paid into his plan account, an instrument that exists specifically for his benefit;" (2) "[t]he measure of that recovery is a loss suffered by him alone;" and (3) "that loss itself allegedly arose as the result of [respondent's] failure to follow [petitioner's] own particular instructions, thereby breaching a duty owed solely to him." *Id.* at 6a.

The court of appeals also held that petitioner could not state a claim under Section 502(a)(3). Pet. App. 7a-13a. In the court's view, petitioner sought monetary relief indistinguishable from compensatory damages, which are not available under Section 502(a)(3). *Id.* at 9a-10a. The court rejected petitioner's argument that he was seeking equitable relief because he was suing a fiduciary to recover losses caused by a fiduciary breach—relief that was historically available only in equity. *Id.* at 10a-13a. The court concluded that petitioner's argument was foreclosed by *Mertens* v. *Hewitt Associates*, 508 U.S. 248 (1993), and *Great-West Life & Annuity Insurance Co.* v. *Knudson*, 534 U.S. 204 (2002), because the relief he sought was available in equity only against a trustee and not "as a general rule." Pet. 12a (citation omitted); see *id.* at 9a-13a.

3. Petitioner sought panel and en banc rehearing on the Section 502(a)(2) issue, and the Secretary of Labor filed an amicus brief in support of his petition. The court of appeals denied the petition. Pet. App. 22a-29a.

SUMMARY OF ARGUMENT

ERISA does not leave a participant in petitioner's position without an effective remedy. To the contrary, a participant in a defined contribution plan may sue to recover losses to the plan, including losses attributable to his own account, under Section 502(a)(2), 29 U.S.C. 1132(a)(2), and may also recover for breach of fiduciary duty under Section 503(a)(3), 29 U.S.C. 1132(a)(3).

I. A. Section 502(a)(2), together with ERISA Section 409(a), authorizes a plan "participant" to sue to recover "*any* losses to the plan" resulting from each breach of "*any* of the responsibili-

ties, obligations, or duties imposed upon fiduciaries" by ERISA. 29 U.S.C. 1109(a), 1132(a)(2) (emphases added). Whenever a defined contribution plan suffers losses, they will be attributable to the individual accounts of plan participants. But that does not alter their character as "losses to the plan." Although the assets of a defined contribution plan are allocated, as a bookkeeping matter, to individual accounts for the beneficial interest of the participants, the assets are held in trust and legally owned by the plan trustees. Thus, losses attributable to a participant's individual plan account are "losses to the plan" recoverable under Section 502(a)(2). That conclusion is reinforced by 29 U.S.C. 1104(c) (2000 & Supp. IV 2004), which, in certain circumstances, exempts fiduciaries from liability for losses caused by a participant's exercise of control over assets in his plan account. That provision would be superfluous if fiduciaries never had liability for losses attributable to an individual plan account.

B. Allowing suits to recover plan losses attributable to a participant's account furthers ERISA's purpose of protecting participants by "providing * * * appropriate remedies * * * and ready access to the Federal courts" to enforce ERISA's fiduciary duties. 29 U.S.C. 1001(b). That purpose would be undermined if Section 502(a)(2) did not authorize such suits. At a minimum, fiduciaries of defined contribution plans would be immunized from liability for breaches of duty, no matter how egregious, if they primarily affected the plan account of only a single participant. Moreover, there is no statutory or logical basis to limit a holding that Section 502(a)(2) does not provide relief to suits affecting only a single participant's account. Thus, a holding that petitioner is not entitled to sue here would seriously undermine the protection ERISA provides for the retirement savings of millions of Americans.

C. A holding that Section 502(a)(2) authorizes petitioner's suit is fully consistent with *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134 (1985). Unlike petitioner, the plaintiff in *Russell* did not seek to recover for the plan losses to

the plan. Instead, she sought to recover for herself compensatory and punitive damages that she suffered personally because of a delay in receiving her benefits.

II. A. ERISA Section 502(a)(3), which provides for "appropriate equitable relief" to redress violations of ERISA, 29 U.S.C. 1132(a)(3), also authorizes suits against fiduciaries to recover losses from fiduciary breaches.

The "equitable relief" authorized by Section 502(a)(3) is relief that was "typically available in equity" rather than at law. *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 256 (1993) (emphasis omitted). Relief is equitable if both the claim and the remedy sought would have been considered equitable in the days of the divided bench. See *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 213 (2002); *Sereboff* v. *Mid Atl. Med. Servs., Inc.*, 126 S. Ct. 1869, 1873-1877 (2006). Historically, equity courts exercised virtually exclusive jurisdiction over claims by a beneficiary against a trustee for breach of trust. In those actions, equity provided a variety of remedies, one of which was to compel the trustee to redress the breach through the payment of money. That remedy, which was sometimes referred to as "surcharge," allowed the beneficiary to charge the trustee either for any profits made as a result of the breach or for the amount necessary to restore losses that would not have been suffered if the trust had been properly administered. Although surcharge was a form of monetary redress, it was distinct from legal damages and was available only in equity for a claim over which equity had exclusive jurisdiction. A suit against an ERISA fiduciary to recover losses caused by a breach of duty is therefore "equitable relief" under Section 502(a)(3).

B. Construing Section 502(a)(3) to authorize suits to redress fiduciary breaches also accords with the central role of fiduciaries and fiduciary duties under ERISA. Given that central role, it is hard to imagine that Congress would have left participants who have been injured by fiduciary breaches without any effec-

tive federal remedy. But that it is precisely the result that respondents seek.

C. Indeed, a holding that Section 502(a)(3) does not authorize monetary redress for fiduciary breaches would do more than deprive a large number of injured participants of an effective *federal* remedy. It would leave them without *any* meaningful remedy because virtually all state-law remedies for breach of fiduciary duty would be preempted by ERISA.

D. Suits under Section 502(a)(3) against fiduciaries for monetary redress of fiduciary breaches are consistent with both *Mertens* and *Great-West*. *Mertens* was a suit not against a fiduciary, but against a third party who provided services to the plan. Third-party service providers have no real power to control plan actions. This Court therefore concluded in *Mertens* that Congress reasonably decided not to provide damages actions against them. And there is little need for such an ERISA remedy because state-law remedies will generally be available. Fiduciaries, in contrast, are central to the ERISA regime, and state-law remedies against them are generally preempted. Moreover, unlike petitioner, who seeks the equitable remedy of surcharge, the plaintiffs in *Mertens* sought compensatory and punitive damages, relief that was typically available from courts of law. Likewise, *Great-West* was not a suit against a fiduciary seeking the equitable remedy of surcharge, but a suit by a plan against beneficiaries seeking money damages for breach of contract. That dispute did not implicate the concern to protect the interests of plan participants that motivated Congress to enact ERISA.

ARGUMENT

ERISA is a complicated statute. But it is neither so complicated nor so counterintuitive that it leaves someone in petitioner's position without a remedy. Congress enacted ERISA "to protect * * * the interests of participants in employee benefit plans and their beneficiaries * * * by establishing standards of conduct, responsibility, and obligation for fiduciaries of [those]

plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. 1001(b). To that end, ERISA imposes stringent duties on plan fiduciaries, 29 U.S.C. 1104 (2000 & Supp. IV 2004), and includes several "carefully integrated" provisions authorizing participants and other interested parties to sue to enforce those duties, as well as other ERISA requirements. *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 146 (1985). Despite the evident congressional intent to provide appropriate remedies and ready access to federal court, the court of appeals adopted a construction of Sections 502(a)(2) and 502(a)(3), 29 U.S.C. 1132(a)(2) and (3), that leaves participants in the most common form of pension plan who have been injured by a breach of fiduciary duty without a meaningful remedy from any court, state or federal. Under a correct reading of Sections 502(a)(2) and 502(a)(3), a participant whose account in a defined contribution plan suffers losses as the result of a fiduciary breach has a remedy under both those provisions.

I. SECTION 502(a)(2) AUTHORIZES A PARTICIPANT IN A DEFINED CONTRIBUTION PLAN TO SUE TO RECOVER LOSSES TO THE PLAN THAT ARE ATTRIBUTABLE TO HIS INDIVIDUAL PLAN ACCOUNT

A. ERISA's Text Establishes That A Participant May Seek Relief For Any Losses To The Plan, Including Losses Attributable To His Individual Plan Account

Section 502(a)(2) provides that "[a] civil action may be brought" by a plan "participant," beneficiary, or fiduciary, or by the Secretary of Labor, to obtain "appropriate relief" under Section 409 of ERISA. 29 U.S.C. 1132(a)(2). Section 409(a), in turn, provides that "[a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits

* * * and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." 29 U.S.C. 1109(a). Those provisions authorize a participant in a defined contribution plan to sue to recover losses to the plan that are attributable to his individual account.

Petitioner claims that DeWolff violated its fiduciary duties by failing to invest assets in his plan account in accordance with his directions and that, as a result, the plan and his account held approximately $150,000 less than they would otherwise have held. Pet. App. 2a-3a; Br. in Opp. App. 3a-4a. Petitioner seeks an order requiring DeWolff "to reimburse to the plan amounts necessary so that [his] interest in the plan is what it should have been, but for the breach of fiduciary duty." *Id.* at 50a.

Petitioner's suit falls squarely within the text of Sections 502(a)(2) and 409(a). Those provisions authorize a "participant" to sue "*[a]ny*" fiduciary to recover [redacted] losses to the plan" resulting from "each * * * breach" of *any* of the responsibilities, obligations, or duties imposed upon fiduciaries" by ERISA. 29 U.S.C. 1109(a), 1132(a)(2) (emphases added). As this Court has observed, "the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *HUD* v. *Rucker*, 535 U.S. 125, 131 (2002) (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)). Sections 502(a)(2) and 409(a) thus allow recovery of *all* plan losses caused by a breach of ERISA's fiduciary duties—including losses that are in turn visited upon the account of a particular participant.

Whenever a defined contribution plan suffers losses, those losses necessarily will affect the balances in the plan accounts of one or more participants. Likewise, a recovery of those losses will always be allocated to one or more individual plan accounts. But that does not alter their character as "losses to the plan." It simply reflects the nature of a defined contribution plan. By statutory design, the assets of a defined contribution plan (including "gains and losses" and legal recoveries) are allocated, as a bookkeeping matter, to individual accounts within the plan for

the beneficial interest of the participants, whose benefits are dependent on the amounts so allocated. 29 U.S.C. 1002(34); Employee Benefits Sec. Admin. (EBSA), DOL, *Field Assistance Bulletin 2006-1*, at 8 (Apr. 2006) <http://www.dol.gov/ebsa/pdf/fab2006-1.pdf>. At the same time, ERISA requires the assets to be held in a trust and legally owned by the plan trustees. See 29 U.S.C. 1103(a); 26 U.S.C. 401(a) (2000 & Supp. IV 2004); Rev. Rul. 89-52, 1989-1 C.B. 110. Accordingly, losses attributable to the plan account of an individual participant are "losses to the plan," and they may be recovered in a suit under Section 502(a)(2).

That conclusion is reinforced by Section 404(c) of ERISA, 29 U.S.C. 1104(c) (2000 & Supp. IV 2004). Section 404(c) provides that, if a defined contribution plan "permits a participant * * * to exercise control over the assets in his [plan] account," and the participant exercises that control as defined in the Secretary's regulations, "no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's * * * exercise of control." 29 U.S.C. 1104(c)(1). That provision would serve no purpose if fiduciaries had no liability in the first place for losses that are attributable to an individual participant's plan account. Congress's decision to include Section 404(c)—a limitation on liability in the context of individual plan accounts—thus confirms that fiduciaries are generally liable for losses attributable to individual plan accounts. See *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 258 (1993) (refusing to read ERISA in manner that would "render" a provision "superfluous").[1]

B. Allowing Suits To Recover Plan Losses Attributable To Individual Plan Accounts Furthers ERISA's Purposes

One of ERISA's express purposes is "to protect * * * participants * * * and their beneficiaries" by establishing stan-

[1] Respondents have not contended that they are exempt from liability under Section 404(c).

dards of conduct for fiduciaries and "providing * * * appropriate remedies * * * and ready access to the Federal courts" to enforce those standards. 29 U.S.C. 1001(b). "[T]he crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators." *Russell*, 473 U.S. at 141 n.8. Sections 502(a)(2) and 409(a) "reflect[] [that] special congressional concern about plan asset management" by providing participants and others with a remedy for the breach of "fiduciary obligations related to the plan's financial integrity." *Varity Corp.* v. *Howe*, 516 U.S. 489, 511-512 (1996). ERISA's goals are thus well served by construing Section 502(a)(2) to authorize a participant to sue to recover losses attributable to his individual plan account that have resulted from fiduciary mismanagement of plan assets.

In contrast, ERISA's purposes would be undermined if this Court affirmed the court of appeals' holding that Section 502(a)(2) does not authorize such suits. At a minimum, fiduciaries would be immunized from liability for breaches of duty, no matter how egregious, if the breaches primarily affected the account of a single participant in a defined contribution plan. Plan fiduciaries, participants, and even the Secretary of Labor would be unable to recover losses caused by those breaches. Currently, the Secretary brings many cases each year against fiduciaries who fail to forward employee contributions to their plans. See EBSA, DOL, *Fact Sheet: Retirement Security Initiatives* (Apr. 2007) <http://www.dol.gov/ebsa/newsroom/fsecp.html>. Under the court of appeals' approach, the Secretary would likely be unable to recover losses caused by the diversion of contributions from a single participant's account, even though the plan clearly received fewer assets than it should have. Those limitations on redress for fiduciary breaches would have a substantial impact on the retirement savings of American workers. Defined contribution plans are the predominant type of pension plan in the United States and hold approximately $3.3 trillion in assets. See Board of Governors of the Fed. Reserve Sys., *Flow of Funds Accounts of the United States: Flows and Outstand-*

ings, First Quarter 2007, Statistical Release Z.1, at 113 (June 7, 2007)<http://www.federalreserve.gov/releases/Z1/current/Z1.pdf>.

It is difficult, moreover, to envision how a holding that Section 502(a)(2) does not allow relief could be limited to suits that involve losses to a single participant's account. As discussed above, any losses suffered by a defined contribution plan are always attributable to individual accounts, because ERISA requires the allocation of all of the plan's assets among those accounts. Thus, regardless of the number of participants affected, the nature of the loss remains the same. It is no more a "loss to the plan" when it affects a large number or percentage of participants than when it affects only one. There is therefore no statutory or logical basis on which to draw a line between cases involving losses to a single plan account and cases involving losses to the accounts of many or most participants.

There is also no basis on which to limit a ruling that Section 502(a)(2) does not allow relief to situations where the breach is "individual in nature," Br. in Opp. 6, or the breached duty is "owed solely" to a single participant, Pet. App. 6a. ERISA's fiduciary duties apply to *all* of the assets of a plan and protect *all* plan participants. See 29 U.S.C. 1104(a). And Sections 502(a)(2) and 409(a) provide a remedy for the breach of "*any* of the responsibilities, obligations, or duties imposed upon fiduciaries" by ERISA, regardless of whether the breach affects one participant or all of them. 29 U.S.C. 1109(a) (emphasis added).

Thus, if this Court affirmed the court of appeals' Section 502(a)(2) holding, the Court would, at the very least, create substantial uncertainty about when participants in defined contribution plans may sue to recover plan losses caused by fiduciary breaches. The lower federal courts would likely become mired in litigation as they sought to decide what number or percentage of participants was sufficient to "serve as a legitimate proxy for the plan in its entirety" or when a plan's loss resulted from the breach of "a duty owed solely to" an individual participant. Pet.

App. 6a. Indeed, because there is no coherent way to distinguish this case from cases involving losses affecting many or most plan participants, affirmance of the decision below could lead to a rule that Section 502(a)(2) suits are permissible for a defined contribution plan only when all or virtually all participants have been affected by the breach. That will seldom be the case for Section 401(k) plans, because they usually offer an array of investment options, and different participants elect different options. See EBSA, DOL, *Private Pension Plan Bulletin: Abstract of 2004 Form 5500 Annual Reports* 44 (Mar. 2007) <http://www.dol.gov/ebsa/PDF/2004pensionplanbulletin. pdf>. Because Section 401(k) plans comprise the majority of ERISA-covered pension plans, *id.* at 2, 44, adopting the court of appeals' approach could significantly reduce the protection that ERISA provides for the retirement assets of millions of Americans.

C. Construing Section 502(a)(2) To Authorize Relief In This Case Is Consistent With This Court's Decision In *Russell*

The court of appeals mistakenly concluded that Section 502(a)(2) does not authorize relief in this case primarily because it misinterpreted this Court's decision in *Russell*. See Pet. App. 5a-6a. Contrary to the court of appeals' belief, *Russell* poses no barrier to a suit like petitioner's, in which a participant in a defined contribution plan seeks to recover for the plan losses caused by a fiduciary breach and manifested in the participant's plan account. The plaintiff in *Russell* did not seek a recovery for the plan of losses to the plan . Instead, she sought a recovery for herself of compensatory and punitive damages that she had suffered personally because of a delay in her receipt of disability benefit payments. 473 U.S. at 137-138. *Russell*'s holding that Section 502(a)(2) does not authorize damages payable directly to a participant does not affect the availability of relief payable to a plan, even if the participant who initiates the suit knows that the plan will allocate the award to the participant's plan account.

Indeed, *Russell*'s reasoning supports the availability of relief here. The Court distinguished the relief sought in *Russell*—damages payable directly to a participant for pain and suffering—from relief payable to the plan to recoup "losses to the plan" arising from mismanagement of plan assets, which the Court understood to be available under Section 502(a)(2). See 473 U.S. at 140-141 & n.8, 142, 144. That is precisely what petitioner seeks here—a payment to the plan equal to the losses to the plan that resulted from respondent's mismanagement of plan assets. The fact that the losses and recovery are both attributable to petitioner's plan account does not change the result. Indeed, Congress, in specifically empowering a participant to sue to recover for the plan, presumably anticipated that a participant would have an incentive to sue precisely because relief for the plan would also inure to the participant's benefit.

The court of appeals mistakenly concluded that *Russell* precludes relief because it gave an overly literal reading to this Court's statement in *Russell* that a recovery under Section 502(a)(2) "must 'inure[] to the benefit of the plan *as a whole*.'" Pet. App. 5a (quoting 473 U.S. at 140). As this Court has admonished, it is "generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code." *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 515 (1993). The statement in *Russell* sought to distinguish between a recovery for the plan of losses to the plan (which is permitted by Section 502(a)(2)) and a recovery for an individual participant in his personal capacity of compensatory or punitive damages suffered by that participant alone (which is not). In emphasizing that distinction, the court may have had in mind a situation where the recovery would benefit all participants equally, but the Court did not hold that Section 502(a)(2) is limited to that situation. *Russell* did not present that issue. Nor does anything in the text of Sections 502(a)(2) or 409(a) suggest that relief is barred simply because it also benefits plan participants. And imposing such an extratex-

tual limitation on the otherwise broad statutory language would be inconsistent with the Court's "reluctan[ce] to tamper with an enforcement scheme crafted with such evident care as the one in ERISA." 473 U.S. at 147. It would also be inconsistent with the fundamental purpose of ERISA (including its remedial provisions), which is to protect plan participants and their beneficiaries, not simply the plan itself for its own sake.

Moreover, a recovery for the plan of losses attributable to a participant's individual account actually benefits "the plan as whole," even if most of the benefit inures to the individual account holder. A payment to the plan to restore losses to an individual account increases the total assets held by the plan as a whole, and a portion of the recovered assets, like any assets of the plan, generally are available to defray the operating expenses of the entire plan. See EBSA, DOL, *Field Assistance Bulletin 2003-3* (May 19, 2003) <http://www.dol.gov/ebsa/regs/fab_2003-3.html>. The court of appeals therefore erred in concluding that Section 502(a)(2) does not authorize petitioner's suit.

II. SECTION 502(a)(3) AUTHORIZES AN ACTION AGAINST A PLAN FIDUCIARY TO RECOVER LOSSES CAUSED BY A FIDUCIARY BREACH

The court of appeals also erred in holding that Section 502(a)(3) does not permit a suit against a fiduciary to recover losses resulting from a breach of fiduciary duty. Section 502(a)(3) authorizes a plan participant, beneficiary, or fiduciary to bring a civil suit "to enjoin any act or practice which violates" ERISA, including its fiduciary duties, or "to obtain other appropriate equitable relief * * * to redress such violations." 29 U.S.C. 1132(a)(3). A suit to compel a fiduciary to provide monetary redress for a breach of fiduciary duty seeks "equitable relief," and it is therefore authorized under Section 502(a)(3).[2]

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[2] A plan participant, such as petitioner, may seek relief for a fiduciary breach under both Sections 502(a)(2) and 502(a)(3) under ordinary principles of civil procedure, which permit the joinder of alternative claims in a single

A. A Suit Against A Fiduciary To Obtain Monetary Redress For A Breach Of Fiduciary Duty Seeks "Equitable Relief," Because Both The Claim And The Remedy Were Typically Available In Equity In The Days Of The Divided Bench

1. In *Mertens*, this Court concluded that the "equitable relief" authorized by Section 502(a)(3) is relief that was "typically available in equity." 508 U.S. at 256 (emphasis omitted). Applying that standard, the Court held that Section 502(a)(3) did not permit a suit to recover money damages from a non-fiduciary third party who provided services to a plan. See *id.* at 256-263. The Court explained that "[m]oney damages are * * * the classic form of *legal* relief," and Congress could reasonably have decided not to provide that relief against non-fiduciaries because, unlike fiduciaries, they have "no real power to control what the plan d[oes]." *Id.* at 255, 262.

The Court revisited the scope of Section 502(a)(3) in *Great-West Life & Annuity Insurance Co.* v. *Knudson*, 534 U.S. 204 (2002). In *Great-West*, the Court held that Section 502(a)(3) did not authorize an ERISA plan to sue to enforce a plan provision requiring beneficiaries to reimburse the plan for medical benefits for which they received a recovery from third parties. See *id.* at 206, 221. The Court concluded that the plan was not seeking "equitable relief" because, in essence, the plan sought compensatory damages from the beneficiaries "for a *contractual* obligation to pay money—relief that was not typically available in equity," *id.* at 210 (emphasis added); accord *id.* at 211-213. The Court rejected the plan's effort to characterize that relief as equitable

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action. Fed. R. Civ. P. 8(a), 8(e)(2); 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* §§ 1257, 1282, 1283 (3d ed. 2004). If this Court rejects the argument that Section 502(a)(2) provides a remedy here, or if relief for the breach otherwise proves unavailable under Section 502(a)(2), then the participant could recover under Section 502(a)(3). If, however, adequate relief is available under Section 502(a)(2), then the participant would generally not be entitled to relief under Section 502(a)(3), because additional relief would not be "appropriate," 29 U.S.C. 1132(a)(3). See *Varity*, 516 U.S. at 515.

restitution because the plan sought a recovery from the general assets of the beneficiaries rather than from specific funds to which the plan claimed a right. See *id.* at 212-218. The Court explained that, in the days of the divided bench, restitution was available at both law and equity, and, therefore, "whether it is legal or equitable" under Section 502(a)(3) "depends on 'the basis for [the plaintiff's] claim' and the nature of the underlying remedies sought." *Id.* at 213 (citation omitted).

The Court most recently addressed the meaning of "equitable relief" in *Sereboff* v. *Mid Atlantic Medical Services, Inc.*, 126 S. Ct. 1869 (2006). There, the Court concluded that a plan could enforce a reimbursement provision under Section 502(a)(3) because the beneficiary had preserved the disputed funds pending resolution of the claim, and the plan sought to enforce "an equitable lien established by agreement" against those funds. *Id.* at 1873-1877. The Court held that the plan sought "equitable relief" under Section 502(a)(3) because both the basis for the plan's claim and the relief sought would have been considered equitable in the days of the divided bench. *Ibid.*

2. Under the analysis in those cases, a suit against a plan fiduciary to recover losses caused by a breach of fiduciary duty seeks "equitable relief." Both the claim and the relief were typically—indeed, exclusively— available in equity in the days of the divided bench.

a. A suit against an ERISA fiduciary to recover losses caused by the fiduciary's breach is precisely analogous to a traditional action by the beneficiary of a trust to compel the trustee to redress a breach of trust. Those claims have always been at the heart of equitable jurisdiction. The courts of equity first recognized the trust as an institution and fostered and developed it. George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* § 870, at 123 (rev. 2d ed. 1995) (Bogert). In a trust, the legal title to property is held by the trustee for the benefit of the beneficiary. Because the beneficiary has only an equitable rather than a legal interest in the trust property, and the trustee's duty

to the beneficiary is also equitable, the beneficiary generally could not enforce that duty in a court of law. See 1 Austin W. Scott & William F. Fratcher, *The Law of Trusts* §§ 2.6-2.7, at 48-49 (4th ed. 1987) (Scott); James P. Holcombe, *An Introduction to Equity Jurisprudence on the Basis of Story's Commentaries* 10 (1846) (Holcombe). Equity therefore exercised exclusive jurisdiction over claims by a beneficiary against a trustee for breach of trust, subject to limited exceptions not relevant here. Restatement (Second) of Trusts § 197, at 433 (1959) (Second Restatement); *id.* § 198, at 434; see *Duvall* v. *Craig*, 15 U.S. (2 Wheat.) 45, 56 (1817) ("A trustee, merely as such, is, in general, only suable in equity."); *Manhattan Bank* v. *Walker*, 130 U.S. 267, 271 (1889) ("The suit is plainly one of equitable cognizance, the bill being filed to charge the defendant, as a trustee, for breach of trust.").

b. In an action for breach of trust, equity provided a variety of remedies. See Second Restatement § 199, at 437. One of those remedies was "to compel the trustee to redress [the] breach," including by "the payment of money." *Ibid.*; 3 Scott § 199.3, at 206; see 4 John N. Pomeroy, *A Treatise on Equity Jurisprudence* § 1080, at 229 (5th ed. 1941) (Pomeroy) ; John Adams, Jun., *The Doctrine of Equity; Being a Commentary on the Law as Administered by the Court of Chancery* 93 (1850) (Adams); 2 Joseph Story, *Commentaries on Equity Jurisprudence* §§ 1266-1278, at 519-534 (12th ed. 1877) (Story). Depending on the circumstances, the beneficiary could "charge the trustee with any loss that resulted from the breach of trust, or with any profit made through the breach of trust, or with any profit that would have accrued if there had been no breach of trust." 3 Scott § 205, at 237; see Restatement (Third) of Trusts–Prudent Investor Rule § 205, at 222-223 (1992) (Third Restatement).

This monetary recovery for breach of trust was sometimes referred to as "surcharge," because the trustee was "chargeable" for the recovery on top of the trust balance reflected in his accounting. Third Restatement § 205 & cmt. a at 223 (noting that

"the beneficiaries may surcharge the trustee" if a fiduciary breach causes a loss); see Bogert § 862, at 36 (explaining that liability for breach of trust may be imposed "either in a suit brought for that purpose or on an accounting where the trustee is surcharged beyond the amount of his admitted liability"); 3 Scott § 205, at 238-239 (describing the defalcations for which "the trustee is subject to a surcharge"); *Black's Law Dictionary* 1482 (8th ed. 2004) (defining "surcharge" as "[t]he amount that a court may charge a fiduciary that has breached its duty"); *e.g.*, *United States* v. *Mason*, 412 U.S. 391, 398 (1973) (holding that United States was not subject to "surcharge" for paying state tax on property held in trust for Indians because it acted with requisite care (quoting 2 Scott § 176, at 1419 (3d ed. 1967))); *Mosser* v. *Darrow*, 341 U.S. 267, 270-273 (1951) (holding that district court properly imposed "surcharge" on bankruptcy trustee); *Princess Lida of Thurns & Taxis* v. *Thompson*, 305 U.S. 456, 458, 464 (1939) (describing authority of Pennsylvania state court, in "suit in equity," "to surcharge [trustee] with losses incurred").[3]

Courts and treatise writers also used a variety of other terms to refer to surcharge, including "personal liability," "compensation," "indemnification," and "the payment of money." See 4 Pomeroy § 1080, at 229; 3 Scott § 199.3, at 206. They even sometimes called surcharge "damages," particularly after the merger of law and equity. See, *e.g.*, Bogert § 862, at 34; *United States* v. *Mitchell*, 463 U.S. 206, 226 (1983). Despite the varying labels attached to it, surcharge has a long history as a distinct remedy available exclusively in equity. That remedy also differed from the legal remedy of damages in significant ways: First, surcharge was sometimes measured by the trustee's improper gains,

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[3] The term "surcharge" was also used to refer to the situation, on an equitable bill for account, in which an equity court would permit a stated account to be reopened and adjusted to add a credit that had been improperly omitted. See 1 Story § 525, at 520; *Black's Law Dictionary* 1482. In this brief, we use the term not in that sense but to refer to the monetary redress that equity courts provided for breach of fiduciary duty.

rather than the beneficiary's loss. See 3 Scott § 205, at 237 (trustee may be charged "with any profit made through the breach of trust"). Second, even when measured by the beneficiary's loss, surcharge provided compensation only for economic injury, not non-pecuniary harm. See *id.* at 237-250 (describing extent of trustee's liability and making no mention of liability for non-economic injury); Third Restatement § 205, at 223 (same). Third, at least in the days of the divided bench, surcharge was limited to make-whole relief, and neither nominal nor exemplary damages were available. See 2 Story § 1278, at 534 (purpose of remedy is "to compensate the *cestui que trust*"); 3 Scott § 205, at 239 (trustee "is not subject to a surcharge for a breach of trust that results in no loss"); Dan B. Dobbs, *Law of Remedies* § 3.11(1), at 315 (1993) (punitive damages were traditionally not available in equitable actions, although courts have begun to award them since the merger of law and equity); accord *Tull* v. *United States*, 481 U.S. 412, 422 (1987). Thus, although surcharge was a form of monetary redress, it was an equitable remedy distinct from legal damages that was available only in equity for a claim over which equity had exclusive jurisdiction.

Moreover, surcharge was available for the precise breach of duty that petitioner has alleged here—a fiduciary's purchase of improper investments. See Third Restatement § 205 cmt. a, at 233; Adams 94; 2 Story §§ 1273-1274, at 526-529; *Gates* v. *Plainfield Trust Co.*, 194 A. 65 (N.J. 1937) (per curiam). Thus, a suit against a fiduciary to recover investment losses caused by a breach of fiduciary duty seeks "equitable relief" and is authorized by Section 502(a)(3).[4]

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[4] That conclusion is supported by the case law on the right to jury trial in breach-of-trust cases. Until this Court's decision in *Great-West*, all the courts of appeals that had considered an action for monetary relief against a breaching fiduciary under either Section 502(a)(2) or Section 502(a)(3) of ERISA had concluded that there was no right to a jury trial because the claims were equitable. See, *e.g.*, *Phelps* v. *C.T. Enters., Inc.*, 394 F.3d 213, 222 (4th Cir. 2005); *Borst* v. *Chevron Corp.*, 36 F.3d 1308, 1323-1324 (5th Cir. 1994), cert.

B. Suits Under Section 502(a)(3) To Redress Fiduciary Breaches Accord With The Central Role Of Fiduciaries And Fiduciary Duties Under ERISA

Fiduciaries and fiduciary duties have a central role in the ERISA regime. Fiduciaries have primary responsibility for administration and control of ERISA-covered plans. See *Mertens*, 508 U.S. at 262; 29 U.S.C. 1002(21)(A). Congress therefore viewed the fiduciary duties imposed by ERISA as affording critical protection for plan participants and beneficiaries. 29 U.S.C. 1001(b). And Congress intended ERISA to provide "appropriate remedies" and "ready access to the Federal courts" to prevent and to redress violations of those fiduciary duties. *Ibid.*

It is thus "hard to imagine" that Congress would have left participants and beneficiaries who have been injured by a breach of ERISA's fiduciary duties without any effective federal remedy. *Varity*, 516 U.S. at 513. But that is what would occur in many situations if this Court held that Section 502(a)(3) does not authorize suits against fiduciaries to recover losses for fiduciary breaches. As discussed above, relief under Section 502(a)(2) is available for breaches of fiduciary duty that result in "losses to the plan." 29 U.S.C. 1109(a). But many breaches, particularly in the context of welfare plans, cause losses only to individual participants and beneficiaries and not to the plan. For example, a fiduciary's negligence in submitting health insurance premiums may leave a plan participant without coverage during a costly illness. *E.g.*, *McFadden* v. *R&R Engine & Mach. Co.*, 102 F. Supp. 2d 458 (N.D. Ohio 2000). Similarly, a fiduciary's negligent

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denied, 514 U.S. 1066 (1995). Likewise, courts generally held that there was no right to a jury trial in non-ERISA fiduciary-breach cases. See, *e.g.*, *In re Evangelist*, 760 F.2d 27, 29 (1st Cir. 1985); *Uselman* v. *Uselman*, 464 N.W.2d 130, 137 (Minn. 1990); *First Ala. Bank, N.A.* v. *Spragins*, 475 So. 2d 512, 513 (Ala. 1987) (per curiam); but see *Pereira* v. *Farace*, 413 F.3d 330, 339-341 (2d Cir. 2005) (reading *Great-West* to require a jury trial in a non-ERISA breach-of-fiduciary-duty case), cert. denied, 126 S. Ct. 2286 (2006).

processing of a life insurance application or premiums may leave a participant's beneficiaries without the insurance proceeds that they expected. *E.g.*, *Strom* v. *Goldman Sachs & Co.*, 202 F.3d 138, 140-141 (2d Cir. 1999). And a fiduciary's provision of inaccurate information about the tax consequences of distribution options may cause a participant to suffer a substantial tax liability that should have been avoided. *E.g.*, *Griggs* v. *E.I. DuPont de Nemours & Co.*, 237 F.3d 371, 373-374 (4th Cir. 2001). Thus, if Section 502(a)(3) did not permit traditional suits in equity for monetary redress of fiduciary breaches that caused participants or beneficiaries to lose payments or distributions from the plan (see Third Restatement § 205(b) at 233), ERISA would provide no meaningful relief for a large class of participants and beneficiaries who have been seriously injured by those breaches. The adverse consequences would even more severe if this Court held, contrary to our submission in Part I, that Section 502(a)(2) is not available in a case like this one even though a recovery would be paid into the plan.

The court of appeals suggested that, even if monetary relief were precluded under Section 502(a)(3), participants and beneficiaries would not lack an ERISA remedy, because they could seek an injunction compelling the fiduciary to fulfill its duties or, in some circumstances, bring suit on the plan's behalf to remove the fiduciary. Pet. App. 13a. But those remedies, even in the limited circumstances in which they are available, are hollow ones for individuals who have already suffered devastating financial losses as a result of fiduciary misdeeds. Leaving those participants and beneficiaries without a meaningful federal remedy cannot be squared with ERISA's purpose of providing them with "ready access to the Federal courts" to redress violations of ERISA's fiduciary duties. 29 U.S.C. 1001(b). It is particularly appropriate to interpret Section 502(a)(3) as providing the necessary remedy. As this Court has noted, Congress intended Section 502(a)(3) to be a "'catchall' provision[]" that would "act as a safety net, offering appropriate equitable relief for injuries

caused by violations that § 502 does not elsewhere adequately remedy." *Varity*, 516 U.S. at 512.

C. Suits Under Section 502(a)(3) To Redress Fiduciary Breaches Are Necessary To Achieve ERISA's Goal Of Protecting Plan Participants And Beneficiaries

A holding that Section 502(a)(3) does not authorize monetary redress for fiduciary breaches would do more than deprive a large number of injured participants and beneficiaries of an effective *federal* remedy. It would leave them without *any* meaningful remedy. Congress could not have intended that result.

ERISA contains an expansive preemption provision, which generally displaces all state laws that "relate to any [ERISA-covered] plan." 29 U.S.C. 1144(a). That preemption provision overrides state-law remedies against plan fiduciaries arising from a breach of an ERISA fiduciary duty. See, *e.g.*, *Peralta* v. *Hispanic Bus., Inc.*, 419 F. 3d 1064, 1069 (9th Cir. 2005); *Eckelkamp* v. *Beste*, 315 F.3d 863, 870 (8th Cir. 2002); *Dudley Supermkt., Inc.* v. *Transamerica Life Ins. & Annuity Co.*, 302 F.3d 1, 4 (1st Cir. 2002); *Kramer* v. *Smith Barney*, 80 F.3d 1080, 1083 (5th Cir. 1996); see also *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 208-209 (2004). Consequently, if a participant or beneficiary who has been injured by a fiduciary breach has no effective remedy under ERISA, he has no effective remedy at all. Congress could not have intended to replace otherwise available state-law remedies with nothing. Leaving participants and beneficiaries without any meaningful remedy would severely undermine ERISA's goal of "protect[ing] * * * the interests of participants in employee benefit plans and their beneficiaries." 29 U.S.C. 1001(b).

For that reason, the narrow reading of Section 502(a)(3) mistakenly adopted by the court of appeals, and by several other courts since *Mertens* and *Great-West*, has led to a "rising judicial chorus urging" the correction of "an unjust and increasingly tangled ERISA regime." *Davila*, 542 U.S. at 222 (Ginsburg, J.,

joined by Breyer, J., concurring) (citation omitted). See, *e.g.*, *Eichorn* v. *AT&T Corp.*, No. 05-5461, 2007 WL 1574869, at *1-*2 (3d Cir. May 31, 2007) (Ambro, J., concurring in denial of petition for rehearing en banc); *Lind* v. *Aetna Health Inc.*, 466 F.3d 1195, 1200 (10th Cir. 2006); *Pereira* v. *Farace*, 413 F.3d 330, 345-346 (2d Cir. 2005) (Newman, J., concurring), cert. denied, 126 S. Ct. 2286 (2006); *Cicio* v. *Does 1-8*, 321 F.3d 83, 106 (2d Cir. 2003) (Calabresi, J., dissenting in part), vacated, 542 U.S. 933 (2004); *DiFelice* v. *Aetna U.S. Healthcare*, 346 F.3d 442, 467 (3d Cir. 2003) (Becker, J., concurring).

Legal scholars have echoed the judicial concern that participants and beneficiaries cannot be left "betrayed without a remedy." Colleen E. Medill, *Resolving the Judicial Paradox of "Equitable" Relief Under ERISA Section 502(a)(3)*, 39 J. Marshall L. Rev. 827, 852 (2006); see, *e.g.*, John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Errors in* Russell, Mertens, *and* Great-West, 103 Colum. L. Rev. 1317, 1353-1362 (2003); Randall J. Gingiss, *The ERISA Foxtrot: Current Jurisprudence Takes One Step Forward and One Step Back in Protecting Participants' Rights*, 18 Va. Tax Rev. 417 (1998); Jayne E. Zanglein, *Closing the Gap: Safeguarding Participants' Rights by Expanding the Federal Common Law of ERISA*, 72 Wash. U. L.Q. 671 (1994). Accordingly, this Court should correct the court of appeals' misinterpretation of Section 502(a)(3) and hold that make-whole monetary relief is available against fiduciaries who breach their ERISA duties.

D. Neither *Mertens* Nor *Great-West* Precludes Suits Under Section 502(a)(3) Against Fiduciaries For Monetary Redress Of Fiduciary Breaches

1. Contrary to the conclusion of the court of appeals (Pet. App. 9a-13a), suits under Section 502(a)(3) against fiduciaries for monetary redress of fiduciary breaches are fully consistent with this Court's decision in *Mertens*. *Mertens* was a suit against not a fiduciary but a third party who provided services to the plan.

As this Court explained, in contrast to fiduciaries, third-party service providers are not central to the ERISA regime. Unlike fiduciaries, they have "no real power to control" the actions of the plan. *Mertens*, 508 U.S. at 262. And ERISA does not expressly provide any remedies against them, whereas it provides an express remedy against fiduciaries for losses to the plan that result from a breach of their ERISA duties. See *id.* at 253. Given the peripheral role of third-party service providers and the absence of any express remedy, the Court concluded that Congress reasonably decided not to provide a damages action against them, particularly since monetary relief is available against fiduciaries. See *id.* at 262-263.

There is also less need for ERISA to provide monetary relief against third-party service providers because state-law remedies are generally available against those defendants. The courts of appeals "routinely find that garden-variety malpractice or negligence claims against non-fiduciary plan advisors, such as accountants, attorneys, and consultants, are not preempted" by ERISA, especially when the claims are brought by or on behalf of plans. *Gerosa* v. *Savasta & Co.*, 329 F.3d 317, 324 (2d Cir.) (citing cases), cert. denied, 540 U.S. 967, and 540 U.S. 1074 (2003). Those courts have reasoned that Congress did not intend "to preempt state laws that do not affect the relationships among" the "core ERISA entities: beneficiaries, participants, administrators, employees, trustees and other fiduciaries, and the plan itself." *Ibid.* Thus, claims against third-party service providers are generally not preempted unless they "'provid[e] alternate enforcement mechanisms' for employees to obtain ERISA plan benefits." *LeBlanc* v. *Cahill*, 153 F.3d 134, 147 (4th Cir. 1998) (citation omitted); *e.g.*, *Gibson* v. *Prudential Ins. Co.*, 915 F.2d 414, 418 (9th Cir. 1990). In contrast, state-law remedies against fiduciaries who have breached their fiduciary duties generally are preempted. See p. 22, *supra*.

In addition, unlike petitioner, who seeks the "'make whole' * * * equitable relief" provided by surcharge, Br. in Opp. App.

4a, the plaintiffs in *Mertens* did not seek equitable relief. See *Mertens*, 508 U.S. at 255 (plaintiffs "do not * * * seek a remedy traditionally viewed as 'equitable.'"). Although their claim—an action against a third party for participating in a breach of trust—was cognizable in equity, see Bogert § 870, at 135, they sought as a remedy "all damages according to proof" and "punitive damages." J.A. at 17, *Mertens*, *supra* (No. 91-1671). Compensatory and punitive damages, unlike surcharge, were typically available from courts of law rather than courts of equity. See *Mertens*, 508 U.S. at 255; p. 18-19, *supra* (discussing the differences between surcharge and legal damages).

As the Court noted in *Mertens*, courts of equity would sometimes provide legal remedies under the clean-up doctrine, see 508 U.S. at 256 (citing 1 Pomeroy § 181, at 257), but, under *Mertens*, the fact that equity would occasionally award legal remedies does not make those remedies "equitable relief" within the meaning of Section 502(a)(3). See *id.* at 256-258. Indeed, equity would sometimes award legal relief under the clean-up doctrine in suits against third parties who injured a trust. For example, if a third party committed a tort or a breach of contract against the trust, the appropriate remedy was an action by the trustee against the third party, which the trustee generally had to bring at law. Second Restatement § 280, at 38-42; Holcombe 22 n.2. If the trustee refused to sue, the beneficiary could sue the trustee in equity for breach of trust. Second Restatement § 282 & cmt. e, 44-45. In that suit, equity would permit the beneficiary to join the third party as a defendant, in order to avoid the need for multiple suits—one at equity by the beneficiary against the trustee and the other at law by the trustee against the third party. See *ibid.*; 4 Scott § 282.1, at 30. This Court may have viewed the relief sought by the plaintiffs against the non-fiduciary third party in *Mertens* as a kind of legal relief that equity courts would sometimes award under the clean-up doctrine. See 508 U.S. at 256-258.

Suits under Section 502(a)(3) to obtain redress for fiduciary breaches are also entirely consistent with this Court's decision in *Great-West*. Like *Mertens*, *Great-West* was not a suit by a participant against a fiduciary for breach of fiduciary duty. Instead, *Great-West* was in essence a suit by a plan against beneficiaries for breach of contract. The dispute in *Great-West* thus did not implicate the concern to protect the interests of plan participants and beneficiaries that led Congress to enact ERISA. See 534 U.S. at 221 (noting that Congress gave participants and beneficiaries broad rights to enforce plan terms, without placing any limitation on the nature of the permissible relief, but it provided more limited rights to plan fiduciaries). In addition, like the plaintiffs in *Mertens*, the plan in *Great-West* was not seeking the equitable remedy of surcharge. Rather, the plan was seeking compensation for the beneficiaries' failure to comply with a contractual obligation to reimburse the plan for a tort recovery from a third party. Although the plan argued that it sought the equitable remedy of restitution, the Court concluded that, in reality, the plan sought the legal remedy of money damages for breach of a contractual obligation. See *id.* at 210, 221.

2. The court of appeals adopted an unduly narrow construction of Section 502(a)(3) in large part because it misunderstood this Court's statements in *Mertens* and *Great-West* that "equitable relief" under Section 502(a)(3) is relief that was "*typically* available in equity." Pet. App. 7a (quoting *Mertens*, 508 U.S. at 256); see *Great-West*, 534 U.S. at 210 (quoting *Mertens*, 508 U.S. at 256). The court of appeals mistakenly reasoned that a remedy qualifies as "typically available in equity" only if equity courts awarded that remedy "*as a general rule*," rather than in certain cases or against certain defendants. Pet. App. 11a (quoting *Rego* v. *Westvaco Corp.*, 319 F.3d 140, 145 (4th Cir. 2003)) (emphasis added by court of appeals); see *id.* at 12a-13a (concluding that the remedy sought by petitioner is not equitable because it was available only against fiduciaries who committed a breach of trust). But the Court in *Mertens* did not intend to exclude traditional

remedies in equity that were available only in relatively atypical factual scenarios. Rather, the Court intended to exclude remedies that were typically available only in courts of law, and not in equity, in the days of the divided bench.[5] The remedy of surcharge was not the kind of remedy that the Court intended to exclude. As discussed above, surcharge was not only *typically* available in courts of equity rather than courts of law; it was *exclusively* available in equity courts.

It would make little sense to conclude that a remedy, such as surcharge, which was available *only* in courts of equity, does not qualify as "equitable relief" because those courts imposed limits on its availability. Indeed, that conclusion cannot be squared with this Court's cases. For example, the Court held that the plan in *Sereboff* sought equitable relief even though equity would enforce an "equitable lien 'by agreement'" only against a defendant who had agreed to make specific property available to satisfy his obligation to the plaintiff. See 126 S. Ct. at 1875. Moreover, as the Court explained in *Great-West*, the equitable remedy of restitution was available only against a defendant who had possession of particular funds or property claimed by the plaintiff. See 534 U.S. at 214. And, in *Harris Trust & Savings Bank* v. *Salomon Smith Barney Inc.*, 530 U.S. 238 (2000), the Court stated that an action for restitution or disgorgement of profits against someone who had benefitted from a breach of trust qualified as equitable relief, even though that remedy was available only against a limited category of defendants—those who had

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[5] See *Mertens*, 508 U.S. at 255 (rejecting idea that money damages are equitable relief on the ground that they are "the classic form of *legal* relief"); *id.* at 256 (noting that, although equity courts sometimes awarded legal relief under the clean-up doctrine, such relief was generally provided by courts of law); *id.* at 258 (noting that Section 502 of ERISA, 29 U.S.C. 1132, distinguishes "between 'equitable' and 'legal' relief"); see also *Sereboff*, 126 S. Ct. at 1873-1877 (concluding that a plan's action to enforce a reimbursement provision "qualifies as an equitable remedy because it is indistinguishable from an action to enforce an equitable lien established by agreement," relief available in equity in the days of the divided bench).

received ill-gotten trust assets with knowledge "of the trust and the circumstances that rendered the transfer in breach of the trust." *Id.* at 251, 253. Thus, this Court has repeatedly held that a remedy was "typically available in equity," and therefore qualified as "equitable relief" under Section 502(a)(2), even though the remedy was available only in limited circumstances and against particular defendants.

That conclusion has particular force in this case, which unlike the prior cases considered by this Court, involves a remedy against a fiduciary for breach of fiduciary duties in managing plan assets—a subject at the very core of ERISA. ERISA was enacted against the backdrop of the law of trusts, and Congress specifically intended that the law of trusts would inform interpretation of the Act, including its remedial provisions. *Varity*, 516 U.S. at 502; *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110-111 (1989); H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 295 (1974). It therefore is especially appropriate for relief to be available against a breaching fiduciary under Section 502(a)(3) if it would have been available against a trustee in a court of equity.

The court of appeals also misinterpreted (Pet. App. 11a) statements in *Mertens* and *Great-West* that "equitable relief" does not include "whatever relief a court of equity is empowered to provide in the particular case at issue" or "all relief available for breach of trust at common law." *Mertens*, 508 U.S. at 256-258; *Great-West*, 534 U.S. at 210; see *id.* at 219 ("In *Mertens*, we rejected the claim that the special equity-court powers applicable to trusts define the reach of § 502(a)(3)."). Those statements reflect the proposition that the legal remedies that equity courts sometimes awarded in trust cases under the clean-up doctrine do not in themselves constitute "equitable relief" under Section 502(a)(3). See *Mertens*, 508 U.S. at 256 (explaining that "there were many situations—not limited to those involving enforcement of a trust—in which an equity court could 'establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority'" (quoting 1 Pomeroy § 181, at

257)). The remedy of surcharge was not, however, a legal remedy that courts of equity sometimes awarded under the clean-up doctrine. On the contrary, it was quintessential "equitable relief"—awarded only by courts of equity, for a claim over which courts of equity had exclusive jurisdiction.[6]

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[6] Respondents argue in their motion to dismiss the writ (at 3-6) that petitioner is no longer a "participant" because he withdrew the balance in his plan account in July 2006, and that the case is therefore moot. That contention is without merit. ERISA defines a "participant" as "any employee or former employee of an employer * * * who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer." 29 U.S.C. 1002(7). Petitioner seeks an order requiring DeWolff to reimburse the plan for the losses he suffered as a result of DeWolff's alleged fiduciary breach. If petitioner prevails, the plan will obtain a recovery equal to the losses suffered by petitioner's plan account, and petitioner will have a claim for additional benefits to be distributed out of that recovery. Petitioner therefore is a former employee who "may become eligible to receive a benefit" from the plan if he prevails in his suit, and he is thus a "participant" under 29 U.S.C. 1002(7). See *Firestone*, 489 U.S. at 117-118 ("participant" includes "former employees who * * * have 'a colorable claim' to vested benefits"). For those reasons, the courts of appeals that have addressed the issue have allowed participants in defined contribution plans who have withdrawn their account balances to sue to recover investment losses caused by fiduciary breaches that occurred before the withdrawals. *Graden* v. *Conexant Sys., Inc.*, No. 06-2337, 2007 WL 2177170 (3d Cir. July 31, 2007); *Harzewski* v. *Guidant Corp.*, No. 06-3752, 2007 WL 1598097 (7th Cir. June 5, 2007); *Sommers Drug Stores Co. Employee Profit Sharing Trust* v. *Corrigan*, 883 F.2d 345, 347-350 (5th Cir. 1989).

In any event, whether petitioner is a "participant" and therefore has a statutory cause of action under Section 502(a), 29 U.S.C. 1132(a) (2000 & Supp. IV 2004), is a question on the merits that can be considered by the court of appeals on remand if this Court reverses the judgment below on one of the grounds urged by petitioner. It is not a question about whether there is a live case or controversy. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89-90, 97 (1998); *Harzewski*, 2007 WL 1598097, at *3.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

EDWIN S. KNEEDLER
Deputy Solicitor General

MATTHEW D. ROBERTS
Assistant to the Solicitor General

JONATHAN L. SNARE
Acting Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor

ELIZABETH HOPKINS
Counsel for Appellate and Special Litigation
Department of Labor
Washington, D.C. 20210

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APPENDIX

1. Section 1002 of Title 29 (Section 3 of ERISA) of the United States Code provides, in pertinent part:

Definitions

* * * * *

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

* * * * *

(34) The term "individual account plan" or "defined contribution plan" means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

* * * * *

2. Section 1104 of Title 29 of the United States Code (Section 404 of ERISA) provides, in pertinent part:

Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

* * * * *

(c) Control over assets by participant or beneficiary

(1) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—

(A) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(B) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

* * * * *

3. Section 1109(a) of Title 29 of the United States Code (Section 409(a) of ERISA) provides:

Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

* * * * *

4. Section 1132(a) of Title 29 of the United States Code (Section 502(a) of ERISA) provides, in pertinent part:

Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to

redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), (6), or (7) of subsection (c) of this section or under subsection (i) or (l) of this section;

* * * * *

5. Section 1144(a) of Title 29 of the United States Code (Section 514(a) of ERISA) provides:

Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

* * * * *